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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GREYHOUND LINES, INC., Plaintiff and Appellant, v. FRANCIS G. D'AMBROSIO, M.D. et al., Defendants and Respondents.	B167125 (Los Angeles County Super. Ct. No. BC287180)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alexander H. Williams, III, Judge. Affirmed.

Lynberg & Watkins, Norman J. Watkins, Dana Alden Fox and Phillip M. Hayes for Plaintiff and Appellant Greyhound Lines, Inc.

Bonne, Bridges, Mueller, O'Keefe & Nichols, Mark B. Connely, Patricia Egan Daehnke, William R. Johnson and Vangi M. Johnson; Riley & Reiner, Raymond L. Riley and Scott M. Radin for Defendant and Respondent Francis G. D'Ambrosio, M.D.

Stephan, Oringher, Richman & Theodora, Robert M. Dato, Brian P. Barrow, K. Noelle Ponsetto and Richard J. Ruszat for Defendant and Respondent Bellflower Medical Center.

Plaintiff and Appellant Greyhound Lines, Inc. appeals from the trial court's judgment of dismissal of its complaint for indemnity against Dr. Francis D'Ambrosio and Bellflower Medical Center (collectively, Respondents). Greyhound seeks indemnity for damages paid after a judgment of $15,967,000 was entered against it in March 2002 in a personal injury suit brought by passenger Jeffrey McCardle. Greyhound's indemnity action, consisting of claims against D'Ambrosio for medical negligence and Bellflower for negligent hiring and supervision, depends on Greyhound's ability to establish D'Ambrosio's negligence. Because the jury in the prior action determined D'Ambrosio was not negligent, the trial court found Greyhound was precluded from relitigating the issue and sustained Respondents' demurrer without leave to amend. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. The Previous Suit, McCardle v. Greyhound Lines

On January 18, 2000, a Greyhound bus carrying McCardle was involved in an accident on the I-5 Freeway in Los Angeles. As a result of injuries sustained in the accident, McCardle underwent three surgeries performed by D'Ambrosio at Bellflower Medical Center. After the last surgery on March 16, 2001, D'Ambrosio diagnosed McCardle with incomplete quadriplegia.

On December 13, 2000, McCardle sued Greyhound, claiming Greyhound's negligence in causing the accident resulted in his personal injuries.[1] Greyhound asserted several affirmative defenses, including comparative negligence and intervening negligence as a superceding cause. D'Ambrosio and Bellflower were not named as defendants in the suit, nor did Greyhound cross-claim against either party. Prior to trial, McCardle and Greyhound entered into a high-low settlement agreement, in which both parties waived the right to appeal the jury's verdict.

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[1] *Jeffrey D. McCardle v. Greyhound Lines, Inc.*, LASC case number BC241699.

At trial, Greyhound submitted evidence to establish D'Ambrosio's negligence, including excerpts of D'Ambrosio's deposition testimony and expert testimony about the medical standard of care. Greyhound attempted to subpoena D'Ambrosio to testify, but alleges he avoided the process servers.

The jury received instructions relevant to medical negligence, including BAJI Nos. 2.06 (Deposition Testimony), 2.60 (Burden of Proof and Preponderance of Evidence),[2] 14.91 (Guidelines in Determining Comparative Negligence), 6.01 (Duty of Specialist), 6.30 (Medical Negligence – Standard of Care Determined by Expert Testimony), and 14.66 (Damages – Additional Harm Resulting from the Original Injury).[3] The court rejected Greyhound's request to instruct with a modified BAJI No. 3.79 (Intervening Negligence as a Superceding Cause).[4]

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[2] BAJI No. 2.60, as modified and read to the jury, states, "The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish comparative fault of plaintiff or others (including Francis G. D'Ambrosio, M.D.)."

[3] BAJI No. 14.66 provides, "If you find that the defendant is liable for the original injury to the plaintiff, such defendant is also liable for any aggravation of the original injury or for any additional injury caused by negligent medical or hospital treatment, or care by Dr. D'Ambrosio of the original injury."

[4] The requested modified BAJI No. 3.79 states, "If you find that defendant Greyhound was negligent and that such negligence was a substantial factor in bringing about an injury to the plaintiff but that the immediate cause of the injury was the negligent conduct of Dr. Francis D'Ambrosio, then the conduct of Dr. D'Ambrosio was an unforeseeable act and the defendant Greyhound is relieved of liability for such injury if: [¶] 1. At the time of such conduct defendant Greyhound did not realize or reasonably should not have realized that Dr. D'Ambrosio might so act; or the risk of harm suffered was not reasonably foreseeable; or [¶] 2. A reasonable person knowing the situation existing at the time of the conduct of Dr. D'Ambrosio would have regarded it as highly extraordinary that Dr. D'Ambrosio had so acted; or [¶] 3. The conduct of Dr. D'Ambrosio was extraordinarily negligent and was not a normal consequence of the situation created by defendant Greyhound. [¶] Extraordinary means unforeseeable, unpredictable, and statistically extremely improbable."

On March 15, 2002, the jury returned a verdict in favor of McCardle for $15,967,000. The jury unanimously found Greyhound 100 percent liable for McCardle's injuries, and McCardle and others, including D'Ambrosio, zero percent negligent. The jury answered the following question on the special verdict form:

> **"QUESTION No. 5:** Assuming that 100% represents the total negligence that was a cause of Plaintiff Jeff McCardle's injuries, what percentage of this 100% is due to the negligence of Greyhound Lines, Inc., what percentage of this 100% is due to the negligence of Plaintiff Jeff McCardle, and what percentage of this 100% is due to the negligence of all others.
>
> Answer:
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> | | |
> |---|---|
> | To Defendant Greyhound Lines, Inc. | 100% |
> | To Plaintiff Jeff McCardle | 0% |
> | To others (including Francis G. D'Ambrosio, M.D.) | 0% |
> | **TOTAL** | 100%" |

After the judgment, Greyhound did not move either for a new trial or judgment notwithstanding the verdict. Pursuant to the settlement agreement, it did not appeal. Greyhound satisfied the judgment, making the last payment to McCardle on August 15, 2002.

2. The Present Suit, Greyhound Lines v. D'Ambrosio, et al.

On December 18, 2002, Greyhound sued D'Ambrosio and Bellflower for indemnification, claiming medical negligence, negligent hiring, and negligent supervision. D'Ambrosio demurred to Greyhound's complaint, contending Greyhound's claims were estopped by the special verdict in *McCardle v. Greyhound*. Bellflower joined the demurrer.

On February 25, 2003, the trial court sustained Respondents' demurrer without leave to amend, ruling the elements of collateral estoppel were established. The trial judge found any perceived errors in the underlying action relating to jury instructions or Greyhound's inability to cross-examine D'Ambrosio would have been matters for an appeal, and that Greyhound's waiver of appeal in the previous suit did not entitle it "to run an end-run around the principle of collateral estoppel into this courtroom." The court

denied leave to amend because an amended complaint "would not change the fact that collateral estoppel bars what [Greyhound] want[s] to do here today for all of the reasons we've discussed."

Greyhound filed a timely notice of appeal. (Code Civ. Proc. § 904.1, subd. (a)(1).)

DISCUSSION

1. *Collateral estoppel precludes Greyhound's indemnity claims against D'Ambrosio and Bellflower.*

Greyhound contends the trial court should not have sustained Respondents' demurrer because collateral estoppel does not apply. We review the trial court's ruling de novo, treating material facts as properly pleaded but exercising independent judgment about whether the facts state a cause of action. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 (*Zelig*).)

Collateral estoppel bars relitigation of an issue if: 1) the issue is identical to one actually litigated and necessarily decided in a previous suit, 2) there was a final judgment on the merits, and 3) the party against whom the doctrine is asserted was a party, or in privity with a party, in the previous suit. (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 910.) The moving party bears the burden of proving the criteria are met. (*Barker v. Hull* (1987) 191 Cal.App.3d 221, 226.)

a. <u>*The Issue Was Litigated and Decided*</u>

Each element of collateral estoppel is satisfied here. First, the issue in Greyhound's indemnity claim is identical to that adjudicated in the previous suit. When an issue is "properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined. . . ," it is actually litigated. (Rest.2d Judgments, § 27; see also *Barker, supra,* 191 Cal.App.3d at p. 226.) An issue is necessarily decided when the face of the record clearly shows its determination. (*City of Los Angeles v. Superior Court* (1978) 85 Cal.App.3d 143, 150; *Mattson v. City of Costa Mesa* (1980) 106 Cal.App.3d 441, 445-446.)

Because "there can be no indemnity without liability," Greyhound's claims for indemnification from Respondents based on medical negligence, negligent hiring, and negligent supervision all depend on the predicate issue of D'Ambrosio's negligence. (*Children's Hospital v. Sedgwick* (1996) 45 Cal.App.4th 1780, 1787, quoting *Munoz v. Davis* (1983) 141 Cal.App.3d 420, 425.) Greyhound contends that the trial court deprived it of a full and fair opportunity to litigate this issue by taking the issue of D'Ambrosio's negligence away from the jury in instructing with BAJI No. 14.66 (Damages – Additional Harm Resulting from Original Injury) rather than No. 3.79 (Intervening Negligence as a Superceding Cause).

Despite the court's refusal to give Greyhound's requested instruction, the issue of whether D'Ambrosio was negligent was actually litigated in the prior action. Greyhound: asserted the affirmative defense of intervening and superseding cause in its answer; offered excerpts of D'Ambrosio's deposition testimony; and presented expert testimony about the medical standard of care. The jury received instructions relevant to D'Ambrosio's duty and standard of care, and apportioned no fault to D'Ambrosio. In addition, the issue was necessarily decided as the special verdict form clearly showed the jury unanimously found D'Ambrosio zero percent negligent. When an issue is raised and litigated, a judgment on that issue is preclusive even if some factual or legal arguments were not presented. (*Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 48.) Thus, the rejected instruction did not prevent the jury from deciding D'Ambrosio's negligence, nor does it keep that decision from now binding Greyhound.

Moreover, Greyhound had adequate incentive and procedural opportunities to fully litigate the issue. (*Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation* (1971) 402 U.S. 313, 333 (*Blonder-Tongue*); *Gouvis Engineering v. Superior Court* (1995) 37 Cal.App.4th 642, 650-651 [finding a good faith hearing with different burden of proof and evidentiary standards not binding on a subsequent indemnity action].) Because any fault apportioned to D'Ambrosio would have reduced the non-

economic damages Greyhound owed to McCardle,[5] Greyhound had abundant motivation to litigate the medical negligence issue. The only procedural opportunity lacking in the previous action was Greyhound's self-imposed restriction on the right to appeal. Greyhound's voluntary waiver of appeal was a strategic decision that neither limited its opportunity to litigate nor rendered the first trial unfair. As Greyhound both had and availed itself of the opportunity to litigate the issue of medical negligence in the prior action, the first element of collateral estoppel is satisfied.

b. *There Was a Final Judgment on the Merits*

The second element is also satisfied because the previous suit resulted in a final judgment on the merits. "For purposes of issue preclusion, 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." (Rest.2d Judgments, § 13; see also *Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 936-937.) A preclusive judgment cannot be tentative, but must be the "last word" of the rendering court. (Rest.2d Judgments, § 13, com. a; *Sandoval, supra,* 140 Cal.App.3d at p. 936.)

McCardle v. Greyhound resulted in a unanimous jury verdict, which Greyhound voluntarily waived the right to appeal. A judgment exceeding $15 million was entered and satisfied. A non-appealable, satisfied judgment is the final word, and must be accorded preclusive effect. Because Greyhound cannot contest that the judgment was final, it claims the judgment was not "on the merits" because the jury was not instructed with BAJI No. 3.79. This contention essentially restates Greyhound's argument against the first element detailed above, and it fails for the same reasons.

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[5] Civil Code section 1431.2, subdivision (a) provides, "In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount."

c. *Greyhound Was a Party*

Finally, the third element is uncontested as Greyhound was a party in the previous suit. Thus, the trial court correctly found that the three elements of collateral estoppel are satisfied.

d. *It is Not Unfair to Apply the Doctrine*

Although the elements of collateral estoppel are met, Greyhound argues the doctrine should not be applied for policy reasons. Citing *Vandenberg v. Superior Court*, Greyhound contends it is unfair to apply collateral estoppel in this case because D'Ambrosio avoided service in the previous suit, and because Respondents were not parties to the prior action. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 829 (*Vandenberg*).)

While Greyhound is correct that policy considerations limit the application of collateral estoppel in certain circumstances, those considerations are not present here. Unlike *Vandenberg*, the previous suit in this case took place within the judicial system and is thus distinguishable in three primary ways. First, Greyhound received all the procedural safeguards of the judicial system, and it is not unjust to now hold it to the formalities. Greyhound litigated the issue of D'Ambrosio's negligence in a suit before the Superior Court, and any concerns with the propriety of D'Ambrosio's conduct should have been broached within that suit. Greyhound argues that since it waived appeal, the jury's verdict in the previous suit is analogous to the binding arbitration in *Vandenberg*. However, unlike the parties in *Vandenberg*, Greyhound did not trade away both the benefits and disadvantages of court litigation. Rather, it made a strategic choice to waive the right to appeal to limit its exposure to a damages award. This voluntary waiver does not make it unfair to invoke collateral estoppel against Greyhound.

Second, as the previous suit took place within the judicial system, the current litigation directly impacts the underpinnings of collateral estoppel identified in *Vandenberg*. By potentially overriding the previous jury's finding on D'Ambrosio's negligence, the current action directly threatens the judicial integrity and economy collateral estoppel seeks to protect.

Finally, the court in *Vandenberg* found the policy favoring arbitration outweighed the policy behind collateral estoppel. (*Vandenberg, supra,* 21 Cal.4th at p. 830.) No such policy favoring parties' waiver of appeal exists to outweigh the goals of collateral estoppel in this case.

The policy considerations cautioning against invocation of collateral estoppel by a nonparty to the prior litigation are not at issue in this case. Mutual preclusion is not necessary as "[o]nly the party *against whom* the doctrine is invoked must be bound by the prior proceeding." (*Vandenberg, supra,* 21 Cal.4th at p. 828.) However, the use of collateral estoppel by a nonparty to the prior litigation is potentially unjust and requires a determination that such use is proper. (*Id.* at pp. 829-930; *Parklane Hosiery Co., Inc. v. Shore* (1979) 439 U.S. 322, 326-333.)

Unlike *Vandenberg* and *Parklane*, which involve a plaintiff's use of collateral estoppel to prevent a defendant from relitigating an issue, the present case involves the defendant's invocation of collateral estoppel to foreclose the plaintiff from relitigating an issue it previously lost. In such a case, the requirement imposed by the first element of collateral estoppel, that the identical issue be fully litigated in a previous suit, protects the plaintiff against unfair invocation of the doctrine by nonparties to the prior action. (*Blonder-Tongue, supra,* 402 U.S. at p. 329.) Further, policy considerations support rather than discourage Respondents' use of collateral estoppel because "In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources." (*Ibid.*)

Respondents' invocation of the doctrine in this case is fair and appropriate. Greyhound, the party against whom the collateral estoppel is asserted, was a party in the previous suit. Although Greyhound contends D'Ambrosio acted unconscionably by failing to appear in the prior proceeding, to which he was not a party, in that action Greyhound fully litigated and lost on the issue of D'Ambrosio's negligence. It is now bound by that proceeding, and may not litigate the issue again.

2. The trial court properly denied leave to amend.

Leave to amend must be granted if the plaintiff meets its burden of demonstrating the complaint reasonably could be cured by amendment. (*Zelig, supra,* 27 Cal.4th at p. 1126.) Greyhound did not, and could not, meet this burden. Leave to amend in this case would be fruitless because any action based on D'Ambrosio's negligence would be barred by collateral estoppel. Thus, the trial court did not abuse its discretion by not granting leave to amend.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

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ZELON, J.

We concur:

JOHNSON, Acting P. J.

WOODS, J.